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No. 80-263

IN THE

Supreme Court of the United States

October Term, 1980

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, and ITHACA COLLEGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Ithaca College Faculty Association, NYSUT-AFT, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Questions Presented for Review.

1. Whether the order of the National Labor Relations Board, which directs that respondent Ithaca College rec-

ognize and bargain in good faith with the Ithaca College Faculty Association, NYSUT-AFT, as the exclusive collective bargaining representative of the faculty of Ithaca College, should be enforced when there is a claim, not raised in a timely manner under the rules of the National Labor Relations Board, that the individuals in the bargaining unit are not employees within the meaning of the National Labor Relations Act.

2. Whether the National Labor Relations Board erred in determining that certain procedural tactics utilized by respondent Ithaca College during the representation proceeding before the National Labor Relations Board were not frivolous, and that the petitioner Ithaca College Faculty Association, NYSUT-AFT, was not thereby entitled to be reimbursed for attorneys' fees.

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Opinions Below.

The opinion of the Court of Appeals is not yet officially reported (the opinion of the Court of Appeals is appended to this petition as Appendix "A," pp. A-1 through A-12).

The decision and order of the National Labor Relations Board in this case (Appendix "B," pp. B-1 through B-14) is officially reported at 244 N.L.R.B. No. 54.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved.

The relevant portions of the National Labor Relations Act, as amended (29 U.S.C. §151 *et seq.*), are as follows:

> SEC. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> * * *
>
> SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

SEC. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment—

* * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * *

* * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * *

SEC. 10(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * *

* * *

(e) The Board shall have power to petition any court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate termporary relief or restraining order, and shall file

in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * *

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the United States Court of Appeals for the District of

Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Statement of the Case.

In December, 1977, a labor organization known as the AAUP Chapter, Ithaca College, filed a petition pursuant to Section 9 of the National Labor Relations Act, as amended (29 U.S.C. §150 *et seq.*), and the Rules and Regulations of the National Labor Relations Board (29 CFR §101.17 ff) seeking to have itself certified as the exclusive collective bargaining representative of the full-time faculty employed by respondent Ithaca College (herein referred to as the "Employer" or the "College").

In January, 1978, a hearing was held upon the petition pursuant to the Rules of the NLRB (29 CFR §102.60 *et seq.*). At that hearing, petitioner Ithaca College Faculty Association, NYSUT-AFT (hereinafter referred to as the

ICFA), intervened and thereby became a party in the representation proceeding. At that hearing, each of the parties was given full opportunity to present any and all issues with respect to the existence of a question concerning representation, and the question as to whether the faculty at the College constituted an appropriate unit for bargaining within the meaning of §9(b) of the National Labor Relations Act.

On February 3, 1978, the Regional Director for the Third Region of the NLRB issued a decision and direction of election based upon the record adduced at the representation hearing (a copy of the Decision and Direction of Election is appended as Appendix "C," pp. C-1 through C-7). In that decision, the Regional Director determined that the following constitutes a unit appropriate for bargaining:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York, location, but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act.

Thereafter, the parties agreed by stipulation to amend the unit description to read as follows:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York, location, and at the Albert Einstein Medical Center in New York City, but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act.

As a part of that stipulation (Appendix "D," p. D-1), the parties agreed as follows:

> The undersigned parties do hereby also agree and stipulate that the inclusion in the unit of the seven employees at Ithaca College who are employed at the Albert Einstein Medical Center shall not, in part or in whole, be grounds for objections to conduct affecting the results of the election, and we hereby agree and stipulate that the eligibility issues resolved herein are final and binding upon the parties.

On March 3, 1978, an election was held in the unit found appropriate for purposes of collective bargaining. The results of that election were inconclusive. The number of challenged ballots cast was sufficient to affect the results of the election, and, subsequent to the election, objections were filed to the conduct of that election.

On April 27, 1978, the Regional Director for the Third Region of the NLRB issued a report on challenged ballots and objections, and, on July 26, 1978, the NLRB issued an order adopting the Regional Director's report and ordered that certain ballots be opened (Appendix "E," pp. E-1 through E-3).

The revised tally of ballots which issued as a result of the opening of the challenged ballots necessitated, pursuant to the Regulations of the NLRB (29 CFR §102.70), a run-off election between the "ICFA" and the "No Union" choice. The run-off election was then scheduled to be held on September 29, 1978.

Prior to the holding of the run-off election, however, the College engaged in several procedural maneuvers involving not only the Board but also the Federal Courts, in an attempt to halt the holding of that election. It is this series of maneuvers which the ICFA now points to as evidence that the College was engaging in frivolous litigation in an attempt to thwart the expression of the employees' desires concerning whether they wish to be represented by the ICFA.

Each of the College's tactics was designed to enable it to relitigate the issue of the appropriateness of the unit in view of the then-recent decision of the U.S. Court of Appeals for the Second Circuit in *NLRB v. Yeshiva University*, 582 F. 2d 686 (2nd Cir., July 31, 1978), which was subsequently affirmed by this Court on February 20, 1980 (U. S. , 100 S. Ct. 856).

On August 22, 1978, the College filed a motion for rehearing before the Regional Director. In this motion, the College sought to relitigate the issue of the appropriateness of the unit. Specifically, the College sought a rehearing on the issue of the supervisory and/or managerial status of each of the faculty members included in the unit.

On August 25, 1978, the Regional Director denied the College's motion, and on August 30, 1978, the College requested that the Board review the Regional Director's decision.

While that request was pending before the Board, the College informed the Regional Director on September 15, 1978, that the College was withdrawing the voter eligibility (*Excelsior*) list which it had prepared for the upcoming run-off election.

The employer also moved, in the U. S. District Court for the Northern District of New York by order to show cause dated September 21, 1978, for an injunction against the Regional Director and the NLRB to preclude the holding of the election. At the hearing on the employer's application for the injunction, counsel for the ICFA successfully moved to intervene. On that day, the Judge rendered a bench decision which dismissed the complaint and denied the employer's request for an injunction.

The College immediately informed the Court that it intended to appeal the Judge's dismissal of the complaint, and requested that the District Court issue an injunction pending appeal. This request for injunction was similarly denied.

On September 26, 1978, the College appealed the decision of the District Court to the U. S. Court of Appeals for the Second Circuit and requested an injunction pending appeal. The College's request for an injunction pending appeal was in due course denied by the Second Circuit, and the appeal was subsequently withdrawn.

The Board had, in the meantime, denied the employer's request for review of the Regional Director's decision denying the College's motion for a rehearing on the appropriateness of the unit, and the election took place as scheduled on September 29, 1978. At the election, the College attempted to challenge the ballot of each and every voter. These proposed challenges were rejected by the Board Agent conducting the election.

The September 29 election resulted in challenged ballots sufficient in number to affect the outcome of the election, and, in addition, objections to the conduct of the election were filed by the College.

On November 8, 1978, the Regional Director for the Third Region issued a Report on Objections and Challenges which recommended to the Board that the ICFA be certified as the bargaining representative of the employees in the unit.

Thereafter, the College filed exceptions to this report on or about November 28, 1978.

On January 31, 1979, the Board issued a Decision and Certification of Representatives (Appendix "F," pp. F-1 through F-3), which finally determined that the ICFA was entitled to be the exclusive bargaining agent for the employees in the unit.

On or about February 12, 1979, the College filed a motion for reconsideration before the Board, and on or about February 22, 1979, the Board denied this motion for reconsideration.

On February 23, 1979, the ICFA filed the unfair labor practice charge with which this petition for review is concerned. This charge alleged that the College violated Sections 8(a)(1) and (5) of the National Labor Relations Act by refusing to meet and bargain with the ICFA despite the fact that the ICFA had been certified on January 31, 1979, as the exclusive bargaining agent for the employees in the unit.

On March 29, 1979, the Acting Regional Director for Region 3 issued a complaint and notice of hearing alleging that the College had violated Sections 8(a)(1) and (5) of the Act as had been charged in the unfair labor practice charge filed on February 23rd.

After the College filed its answer to the complaint the General Counsel of the NLRB moved the Board for summary judgment on the complaint, and on May 23, 1979, the Board transferred the unfair labor practice proceeding to itself.

Thereafter, counsel for the ICFA filed with the Board a "Motion in Support of General Counsel's Motion for Summary Judgment and Request for Specific Relief." It is in this document that the ICFA requested to be reimbursed for the attorneys' fees incurred by it during the processing of both the underlying representation case and the unfair labor practice case before the Board.

On August 22, 1979, the NLRB issued the decision and order which is the subject of this proceeding.

The NLRB concluded that the College had committed an unfair labor practice by its refusal to bargain with the ICFA.

The Board reasoned that:

> With the exception of its defense to the allegation that it has refused to supply the Association with certain requested information, all issues raised by respondent in this proceeding were or could have been litigated in the prior representation proceeding, and respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to re-examine the decision made in the representation proceeding.
>
> With respect to the request to supply information, respondent concedes that the Association has

> requested a list of all full-time faculty members currently being considered for promotion and/or tenure. As the collective bargaining representative for employees within the appropriate unit, the Association is entitled to information on the classification and seniority of each unit employee and to information concerning any changes in an employee's status. Consequently, we find that respondent's affirmative defense to the allegation of refusal to supply information is without merit.
>
> We therefore find that respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the motion for summary judgment (B-6).

In a footnote to this last quoted paragraph, the Board rejected the ICFA's request for attorney's fees:

> The Association's request for extraordinary remedies is denied since we do not believe that the defenses raised by the respondent in this proceeding are patently frivolous.

Both the College and the ICFA filed petitions for review with the U. S. Court of Appeals for the Second Circuit. The College sought a dismissal of the Board's unfair labor practice determination, and the ICFA sought a finding that the Board erred in ruling that the Employer's defenses were not "patently frivolous."

Each of these petitions was grounded upon the Court of Appeals' jurisdiction to review orders of the NLRB (29 USC §160[f]). In addition, the NLRB subsequently filed a petition for enforcement of its order pursuant to 29 USC §160(e). The three cases were consolidated for consideration by the Court.

The Second Circuit disposed of these three appeals in a decision issued on May 19, 1980, which resulted in the entry of the judgment for which certiorari is now sought in this Court.

The Second Circuit granted the College's petition for review and dismissed the NLRB's order directing the College to bargain with the ICFA. The Court also denied ICFA's petition for review and the NLRB's cross-petition for enforcement of its order.

The ICFA now seeks a writ of certiorari to have the Judgment of the Court of Appeals reviewed by the Court inasmuch as that decision by the Court of Appeals represents a dramatic departure from principles enunciated in applicable decisions of this Court.

Reasons for Granting the Petition.

The decision of the Second Circuit dismissing the NLRB's finding of an unfair labor practice against the College was clearly an effort by that Court's panel to express its dissatisfaction with the policy of the NLRB to refuse, in certain cases, to acquiesce in the decisions of a Circuit Court of Appeals until such time as the Supreme Court has finally decided a particular issue.

There was no need, however, for the Court to even reach that point of contention inasmuch as the NLRB order in dispute did not rely for its validity on the applicability of the criteria established by the Second Circuit in *Yeshiva*. Rather, the disputed NLRB order relied upon a well-established rule that issues involving representation matters must be raised in a timely manner, and that, if those issues are not so raised, they are forever waived and cannot be raised in the context of a subsequent unfair

labor practice proceeding. The Court of Appeals refused to recognize that fact, and by doing so decided the case in a manner in conflict with applicable decisions of this Court. It is for that reason that the ICFA now seeks review of the judgment of the Court of Appeals.

The ICFA's position that the NLRB's order is enforceable notwithstanding the decision in *Yeshiva* is grounded upon an analysis of the procedural posture of this particular case, the well-established statutory scheme governing the administration of the National Labor Relations Act, and the scope of judicial review of the NLRB's orders.

As a starting point for this analysis, the limited scope of the issues which should have been dealt with by the Court of Appeals should be discussed.

The appeal to the Second Circuit was founded on the authority of Section 10(f) of the National Labor Relations Act, as amended (29 USC §160[f]). The College initiated review, and the NLRB cross-moved, pursuant to Section 10(e) of the Act, for enforcement of its order. The ICFA intervened in the College's appeal, and, in addition, filed its own appeal of the NLRB's refusal to characterize certain defenses raised by the employer before the Board as "frivolous."

The scope of judicial review of orders of the NLRB in cases arising under these provisions of the NLRA is strictly limited. Section 10(e) of the Act provides that:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Similarly, Section 10(f) provides that:

> "* * * the findings of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

The U. S. Supreme Court addressed the issue of the scope of judicial review of NLRB orders in *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951). In that decision, the Court stated:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The duty of the Court of Appeals was thus well defined; the Court was empowered to determine if the factual find-

ings underlying the determination that the College illegally refused to bargain with the ICFA were supported by substantial evidence contained in the record before the Court for review.

It is now submitted that, had the Second Circuit applied that test, it would have found that the record upon which the NLRB based its findings clearly supported those findings, and that those findings should have been conclusive upon the Court.

However, the Second Circuit went beyond the application of this test in rendering its decision. It is this act which constitutes the error the ICFA now seeks to have this Court correct. The question is one which should be decided by this Court in view of the far-reaching consequences that would result from allowing an overly-broad scope of judicial review to be interjected into the administration of the Nation's labor laws.

In the representation proceeding before the NLRB, a hearing was held at which the parties exercised their rights to present whatever evidence they desired with respect to the employee status of the faculty members of the College and also with respect to the issue of the appropriate unit to represent faculty members at the College. The record before the Second Circuit contained the transcript of this representation hearing, together with copies of the exhibits introduced at the hearing and the post-hearing briefs.

On February 3, 1978, the Regional Director for the Third Region of the NLRB issued his Decision and Direction of Election (Appendix "C"). In that decision, the Regional Director made a factual finding that the following constituted an appropriate unit for bargaining:

> "All full-time faculty members employed by Ithaca College at its Ithaca, New York location but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act."

Thereafter, the parties agreed that the appropriate unit would be amended in a minor respect, and expressly waived, by stipulation, any eligibility issues, stating:

> "* * * we hereby agree and stipulate that the eligibility issues resolved herein are final and binding upon the parties" (Appendix "D").

There were no exceptions taken to the Regional Director's findings of fact with respect to the Decision and Direction of Election, which included a finding that department chairmen would be allowed to vote since "the record does not reveal sufficient information upon which to base a conclusion" as to *their* supervisory status (C-5).

Upon the original election conducted among the employees in this unit, the NLRB reviewed the Regional Director's recommendations with respect to the determinative challenges and objections made to that election (Appendix "E"). In its order, dated July 26, 1978, the NLRB stated, *inter alia*, that:

> "* * * it is hereby directed that, as part of the investigation to ascertain a representative for the purposes of collective bargaining among certain employees of Ithaca College *in the unit heretofore found appropriate* * * * The Regional Director * * * shall * * * open and count those ballots to which challenges have been overruled * * *" (Emphasis added.)

It was not until after this Board order that the College first attempted to litigate the issue of the managerial status of the faculty members.

Thus, the instant case is, factually, very different from *Yeshiva*. In *Yeshiva*, the employer raised the managerial status of the faculty at the initial representation hearing. Accordingly, the NLRB and the Courts had in that case a proper record upon which to base their findings of fact.

In the case at bar, the record is totally devoid of any evidence that the College attempted to raise the issue of the managerial status of the faculty at any time prior to the NLRB finding, on July 26, 1978, that the faculty at the College did constitute a unit appropriate for bargaining. This is so despite the fact that the College was free to raise this issue at the initial representation hearing.

In its decision which was before the Second Circuit for review, the Board stated:

> "It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding" (B-5).

Thus, the Board said that the issue of the appropriateness of the unit had already been decided, and that the Employer may not relitigate that issue in the context of the unfair labor practice proceeding arising out of that representation case. The Board relied for its position in this respect on *Pittsburgh Plate Glass Co. v. NLRB*, 313

U. S. 146, 162 (1941), and the Rules and Regulations of the NLRB, §§102.67(f) and 102.69 (c); 29 CFR §102.67(f); 29 CFR §102.69(c).

In view of its determination that the College had waived its right to litigate the managerial status of the employees at issue, the Board made the following finding of fact, denominated as such, in reaching its order which was before the Second Circuit:

> "The following employees of [the College] constitute a unit appropriate for collective bargaining purposes within the meaning of §9(b) of the Act; all full-time faculty members employed by Ithaca College at its Ithaca, New York location and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act" (B-8).

It is thus clear that the factual finding of the NLRB that the faculty at Ithaca College are employees within the meaning of the Act is supported by the substantial evidence on the record showing the facts of the waiver and that that finding of fact should have been conclusive on the issue when it was reviewed by the Second Circuit.

However, the Second Circuit did not feel bound by this factual finding on the issue of waiver, but does not explain why. The decision only scolds the NLRB with respect to its policy of non-acquiescence in certain decisions of Circuit Courts of Appeal.

The real issue in this case, the validity of the Board's factual findings, appears to have been overlooked in the Court's decision to chastise the NLRB for a policy which really has nothing to do with the instant case.

In fact, the Second Circuit specifically stated that

> "* * * Moreover, if there truly was a procedural hurdle that prevented [a hearing on the merits of the College's *Yeshiva* claim], the fact that the Supreme Court affirmed in *Yeshiva* should not have made any difference" (A-7).

The ICFA has consistently argued that the College waived its right to litigate the issue of the managerial status of its faculty. Further, the NLRB clearly stated that such a waiver had occurred.

Accordingly, it is submitted that the litigation in *Yeshiva* should not have any bearing on this case, for the right to present facts upon which the College could argue for the applicability of the *Yeshiva* criteria was lost. The Second Circuit erred in not limiting its inquiry to whether the NLRB's finding of a waiver was based upon substantial evidence.

If the Court had limited its inquiry to the scope allowed by the National Labor Relations Act, it would have discovered that there was evidence in the record to support the Board's finding that the College had waived its right to litigate the issue of the managerial status of the faculty.

The Court would have had to look no further than the Stipulation between the parties that stated that the faculty constituted an appropriate unit for bargaining and that

> "the eligibility issues resolved herein are final and binding upon the parties" (D-1).

Thus, the Second Circuit went beyond its legitimate authority in denying enforcement to the NLRB's order.

In this respect, it should be noted that the decisions of both the Second Circuit and the Supreme Court in *Yeshiva* were a result of nothing more than an application of a traditional "substantial evidence" test. Throughout their decisions, the Courts stressed that their decisions were limited to the facts presented on *the record presented in that case*. It is submitted that, in both *Yeshiva* decisions, the Courts were saying nothing more than that the NLRB's factual finding that the faculty at Yeshiva was an appropriate unit for bargaining was not supported by substantial evidence contained in the record.

In this case, the record does support a finding that the College waived its right to contest whether the faculty were in fact managerial employees, and the Second Circuit would have so found had it applied a proper test. This Court should correct that error in order to establish once again the limited scope of judicial review under the National Labor Relations Act. This Court has consistently voiced its approval of this well-established statutory scheme of the Federal labor law. That policy is that representation issues are litigated within the context of representation proceedings pursuant to Section 9 of the National Labor Relations Act, and that once a labor organization is certified pursuant to that section as the exclusive representative of an appropriate unit, the issue of the appropriateness of the unit is final. That issue may not then be relitigated beyond a review by a court of the record comprising the representation case. On that review, the court determination must be limited to deciding whether the determination of the NLRB was supported by substantial evidence. *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401 (1940); *Leedom v. Kyne*, 358 U. S. 184 (1958); *Universal Camera Corp. v. NLRB, supra.*

The fact that the Second Circuit departed so radically from this well-established principle warrants the granting of a writ of certiorari by this Court.

In addition to applying an overly-broad test of judicial review, the Second Circuit erred, the ICFA submits, by upholding the NLRB's determination that the issues raised by the College before the Board, in both the representation proceeding and the unfair labor practice proceeding, and before the Federal Courts in its unsuccessful attempt to enjoin the holding of the second election were not patently frivolous.

It is well-settled law that, when an employer resists unionization of its employees by engaging in frivolous litigation designed only to delay the employer's performance of a statutory obligation, the employer may be required to pay the legal expenses of the union incurred during the representation proceeding and subsequent unfair labor practice proceeding. *NLRB v. Food Store Employees Union Local 3487 (Heck's Inc.)*, 417 U. S. 1 (1974); *International Union of Electrical Workers v. NLRB (Tiidee Products, Inc.)*, 502 F. 2d 349 (D. C. Cir. 1974). Accordingly, the ICFA contends that the Board erred in refusing to characterize the College's defenses and litigation as "patently frivolous," and that the Court of Appeals erred in concurring with that finding.

A review of the proceedings which have transpired in this case since the filing of the petition in December, 1977, clearly shows that the College's belated but main defense and complaint with respect to the Board's decisions is that the unit found to be appropriate is in fact an inappropriate one. This is a defense which apparently occurred to the College only after the Second Circuit's decision in *Yeshiva* and after the evidentiary record in the representation proceeding had been closed. The Federal Court proceeding in

which the College sought to enjoin the run-off election was founded entirely upon a contention that the unit in which the election had been directed was inappropriate. Also, a review of the record reflects that the issue of the appropriateness of the unit was raised before the Board in both the representation case and the subsequent unfair labor practice case only after the initial election in the certified unit had occurred.

The ICFA, on the other hand, contends that the unit determined to be appropriate by the Board is indeed an appropriate one, and that any objection the College had to the unit determination was either presented or could have been presented at the representation hearing conducted by the Regional Director in early 1978.

The employer had every opportunity, if it had so desired, to introduce whatever evidence it deemed necessary to establish that the unit consisting of faculty members at the College was not an appropriate one for bargaining. The rule that a party must raise unit determination issues at the representation hearing, and the corollary rule that if objections are not raised, the party is precluded from later raising that objection, is well settled, by both case law and by the Board's own rules and regulations.

The rules of the National Labor Relations Board, particularly 29 CFR §102.67(f), clearly state:

> "* * * failure to request review [of a Regional Director's Decision and Direction of Election] shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding * * *"

Here, the College did not seek review of the Regional Director's decision. Accordingly, the ICFA again relies on the concept of waiver which has already been discussed. The issue of the appropriateness of the unit was finally determined, at the very latest, when the Board stated on July 26, 1978, that the unit was appropriate. All of this was done prior to the College's attempts to relitigate the issue.

Despite the fact that the issue was settled, the College engaged in the several procedural maneuvers described above in order to relitigate the issue. As the NLRB said in its decision finding the College guilty of an unfair labor practice, that the College has "not raised any issue which is properly litigable in this unfair labor practice proceeding." It is submitted by the ICFA that, if the issues raised were not properly litigable in that proceeding, then, as a logical extension of that finding, the Board should have also determined that the issues raised by the employer were frivolous. In this respect, the Court should recognize that the Board did not comment upon the merits of the College's argument. Rather, the Board simply stated that those issues were not properly presentable in the proceeding. It should follow naturally that, if a party raises an issue which should not be raised within a particular forum, there should be a finding that the issue, if so raised, is presented frivolously. That is all that the ICFA asks for, and that is all that need be determined in order to entitle the ICFA to reimbursement for its attorneys fees.

The NLRB's decision was, in this respect, inconsistent, and the Second Circuit erred in upholding the Board on the issue. This Court should now grant this petition for a writ of certiorari in order to review those determinations.

This Court is the last available forum in which the employees of ICFA can argue for the protection of their statutory rights, and is respectfully requested to grant the petition.

Alternatively, if this Court finds that the record is inadequate for resolution of the issues, raised herein, the ICFA respectfully urges that the Court vacate the order of the United States Court of Appeals for the Second Circuit and remand the matter back to the NLRB for reconsideration or for such further proceedings it deems appropriate in light of the prior decisions of this Court.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ROCCO A. SOLIMANDO,
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Of Counsel.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 530, 536, 820—September Term, 1979.

(Argued February 22, 1980 Decided May 19, 1980.)

Docket Nos. 79-4150, 79-4176, 79-4210

ITHACA COLLEGE,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,

Intervenor.

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

ITHACA COLLEGE,

Intervenor.

Before:

MEDINA, MULLIGAN and MESKILL,
Circuit Judges.

Petitions for review and cross-petition for enforcement of a decision and order of the National Labor Relations Board finding petitioner Ithaca College in violation of Sections 8(a)(5) and (a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (a)(1), and denying petitioner Ithaca College Faculty Association's request for attorneys' fees.

Ithaca College's petition for review is granted and the proceedings are dismissed. Ithaca College Faculty Association's petition for review and the Board's cross-petition for enforcement are denied.

WILLIAM L. BERGAN, Syracuse, New York (Bond, Schoeneck & King, Syracuse, New York, Tracy H. Ferguson, of counsel), *for Petitioner-Intervenor Ithaca College.*

BERNARD F. ASHE, Albany, New York (Kevin H. Harren, Albany, New York, of counsel), *for Petitioner-Intervenor Ithaca College Faculty Association, NYSUT-AFT.*

CHARLES P. DONNELLY, Washington, D.C. (National Labor Relations Board, Washington, D.C., William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott

Moore, Deputy Associate General Counsel), *for Respondent*.

MULLIGAN, *Circuit Judge*:

On December 8, 1977, the Ithaca College Chapter of the American Association of University Professors (AAUP) filed a petition with the Regional Office of the National Labor Relations Board (the Board) for certification as the collective bargaining representative of the full-time and part-time faculty members of Ithaca College (the College). On February 3, 1978, the Regional Director issued a decision and directed an election in a unit consisting "of all full-time faculty members employed by Ithaca College at its Ithaca, New York location but excluding all . . . part-time faculty, and supervisors as defined in the [National Labor Relations] Act." The election was held on March 3, 1978 with the AAUP, the Ithaca College Faculty Association (ICFA), and "no union" as the choices. None of the three choices on the ballot received a majority of the votes cast and pursuant to the rules of the Board, a run-off election between the first and second choices, "no union" and the ICFA, was scheduled for September 29, 1978.

On July 31, 1978, this Court rendered its decision in *NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), *aff'd*, ____ U.S. ____, 100 S.Ct. 856 (1980), which held that the full-time faculty at Yeshiva University were managerial or supervisory employees under the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq*. (1976), and were therefore ineligible for inclusion in a bargaining unit. In our opinion we indicated that the Board prece-

dents which had been routinely applied in cases involving faculty members in private institutions of higher learning were arbitrary and inconsistent with the Act.

Not surprisingly, on August 4, 1978, the College filed a motion for a rehearing requesting that the record be reopened in light of the *Yeshiva* decision. The response of the Regional Director was prompt and to the point. By letter dated August 25, he stated in relevant part:

> Your motion is denied. The Board may decide to petition the United States Supreme Court for a writ of certiorari to review the Second Circuit's decision in *Yeshiva*. In any case, whether the Board seeks review of this decision, or not, Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals. For these reasons your motion is denied.

The College's request for review of the Regional Director's decision was denied by the Board on September 26, 1978 "as it raise[d] no substantial issues warranting review." While this request was pending, the College sought judicial intervention to postpone the run-off election and to order a hearing on the *Yeshiva* claim. This relief was denied for jurisdictional reasons. *Ithaca College v. Thomas W. Seeler, Regional Director, NLRB*, No. 78-CV-485 (N.D.N.Y. Sept. 26, 1978), motion for stay pending appeal denied, No. 78-6150 (2d Cir. Sept. 28, 1978).

The run-off election was conducted as scheduled on September 29, 1978, and ICFA won by a narrow margin, 116 votes to 109. The College tried to challenge each faculty vote to no avail. It then filed objections to the election, reasserting its challenge of the faculty votes based

on the *Yeshiva* decision, and alleging various other grounds for voiding the election which, given our disposition of this case, we need not detail. In a report issued on November 8, 1978, the Regional Director rejected each of the College's objections and recommended that the ICFA be certified as the bargaining representative of Ithaca's faculty. His report and recommendation were adopted by the Board in February of 1979.

The College, seeking to obtain review of its *Yeshiva* claim, refused to bargain with the ICFA, and on March 29, 1979, the Regional Director issued an unfair labor practice complaint alleging violations of sections 8(a)(5) and (a)(l) of the Act. The College answered by claiming, *inter alia*, that its full-time faculty members were managerial or supervisory employees under the Act. The General Counsel of the Board moved for summary judgment on the ground that the College was not raising any issues that had not already been determined during the representation proceedings. In opposition, the College submitted affidavits from the Deans of each of its Schools which in considerable detail pointed out tht the faculty possessed a large measure of authority over matters affecting academic policy. The affidavits showed that the faculty has effectively determined curricula and admissions standards, and has had an instrumental role to play in the creation and disbanding of several Schools within the College. In addition, the faculty has determined what teachers are to be hired, promoted, and tenured, and has participated in the selection of all of the Deans, a Vice President and the President of the College. In short, the affidavits were directed to the criteria held by this Court in *Yeshiva* to establish the managerial or supervisory status of full-time faculty members.

Thereafter, the General Counsel made a motion to transfer the proceedings to the Board, to strike the College's affirmative defenses, and to grant summary judgment. ICFA made a motion for the award of attorneys' fees. By Decision and Order dated August 22, 1979, and reported at 244 N.L.R.B. No. 54, the Board granted the General Counsel's motion, but denied ICFA's request for attorneys' fees on the ground that the College's defenses were not "patently frivolous." Responding to the College's continued reliance on the *Yeshiva* case, the Board, in a footnote, stated, "With all due respect to the view expressd by the Second Circuit in *Yeshiva*, *supra*, we shall adhere to our position until the Supreme Court has passed on the matter."

The case then came before this Court on petitions of the College and ICFA to review, and a cross-application of the Board to enforce, the order of the Board pursuant to sections 10(f) and 10(e) of the Act. Two days before oral argument was scheduled, the Supreme Court of the United States affirmed our decision in *Yeshiva*. *NLRB v. Yeshiva University*, ____ U.S. ____, 100 S.Ct. 856 (1980). During oral argument we asked for supplemental briefs addressed to the issue of what remedy was appropriate here in view of the Supreme Court affirmance. The Board now seeks a remand for further proceedings. ICFA still urges that we enforce the order and continues to ask for attorneys' fees. The College requests that we grant summary judgment in its favor and vacate the Board's order.

I

The Board has offered us several explanations for its refusal to conduct a hearing on whether the criteria set forth in this Court's *Yeshiva* opinion applied to Ithaca

College's faculty. We find none of these explanations acceptable.

First, the Board claims that the College's request for a hearing was untimely. The record belies that claim. The letter from the Regional Director denying the Board's motion for a rehearing made no mention of untimeliness, but rather, relied on the notion that "Regional Directors are bound to follow and apply Board rather than Court precedent. . . ." The history of the proceedings shows that the College was assiduous in its efforts to raise a *Yeshiva* claim. Moreover, if there truly was a procedural hurdle that prevented the hearing, the fact that the Supreme Court affirmed in *Yeshiva* should not have made any difference, and yet the Board is now willing to conduct a hearing.

Next, the Board argues that it was "not unreasonable" for it to deny a hearing given the fact that ICFA, and even the College, might have sought review in the Circuit for the District of Columbia instead of in the Second Circuit. Seesection 10(f) of the Act. However, the possibility that the D.C. Circuit would have been the court to review the Board's order was so remote that it does not seem likely that the Board actually considered it. Certainly the College was not going to seek review in the D.C. Circuit when it had a favorable precedent in the Second Circuit. And even if ICFA had petitioned for review in the D.C. Circuit first, the College could have moved to transfer the proceedings to the Second Circuit. 28 U.S.C. § 2112(a)(1976). Since most of the parties resided in the Second Circuit, and since ICFA's aggrievement with the Board's order was insignificant in comparison to the College's aggrievement, the transfer would have assuredly occurred. See *J.L. Simmons Co. v. NLRB*, 425 F.2d 52, 55-56 (7th Cir. 1970), transferred, 444 F.2d 895 (D.C. Cir.), cert. denied, 404 U.S. 986 (1971).

Third, the Board states that it did not consider it necessary to conduct a hearing during the proceedings below because it had not "acquiesced" in this Court's decision in *Yeshiva*. Apparently, it is a practice of the Board to refuse to follow unfavorable decisions from the Courts of Appeals even in instances such as this where it is likely that the case will come up for review before the very court with which the Board disagrees. See, e.g., *Bonanno Linen Service, Inc.*, 243 N.L.R.B. No. 140 (1979) (case originating in the lst Circuit, Board refusing to follow decisions of 2d, 3d, 5th, 8th, and 9th Circuits); *Allegheny General Hospital*, 239 N.L.R.B. No. 81 (1978), enforcement denied, 608 F.2d 965 (3d Cir. 1979) (case originating in 3d Circuit, Board refusing to follow decision of that Circuit); *Andrew G. Grutka*, 238 N.L.R.B. No. 216 (1978) (case originating in 7th Circuit, Board refusing to follow decision of that Circuit).

The position of the Board is one in which we cannot acquiesce. While deference is to be given to an agency's interpretation of the statute it administers, see *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978), it is the courts that have the final word on matters of statutory interpretation. See *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 565-66 (1979); *SEC v. Sloan*, 436 U.S. 103, 118-19 (1978); *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 272 (1968); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Safir v. Gibson*, 417 F.2d 972, 976 (2d Cir. 1969), cert. denied, 400 U.S. 850 (1970). "The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review is much akin to that of a United States District Court." *Morand Bros. Beverage v. NLRB*, 204 F.2d 529, 532 (7th

Cir.), cert. denied, 346 U.S. 909 (1953), and as must a district court, an agency is bound to follow the law of the Circuit. See *Mary Thompson Hospital, Inc. v. NLRB*, No. 79-1374 (7th Cir. March 5, 1980); *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979); *NLRB v. Gibson Products*, 494 F.2d 762, 766 (5th Cir. 1974); *Stacey Manufacturing Co. v. Commissioner*, 237 F.2d 605, 606 (6th Cir. 1956); *cf. Cleveland v. Federal Power Commission*, 561 (F.2d 344, 346 (D.C. Cir. 1977) (agency must follow law of the case).

Of course, we do not expect the Board or any other litigant to rejoice in all the opinions of this court. When it disagrees in a particular case, it should seek review in the Supreme Court. During the interim before it has sought review or while review is still pending, it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one. However, the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow. The Board cites no contrary authority except its own consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views. This is intolerable if the rule of law is to prevail.

As the Third Circuit has recently stated:

> A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial district. Thus our judgments . . . are binding on all inferior courts and litigants in the Third Judicial District, and also on administrative agencies when they deal with matters pertaining thereto. . . . [T]he Board is not a court nor is it equal to this court in matters of statu-

> tory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect. . . . For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.

Allegheny General Hospital, supra, 608 F.2d at 970.

Finally, the Board claims that this Court's *Yeshiva* decision dealt with "policy" and therefore was not binding on the Board. However, this Court's opinion in *Yeshiva* made clear that it was not deciding a question of policy, but rather, applying the language of the National Labor Relations Act in accordance with its prior judicial interpretations. See *Yeshiva*, *supra*, 582 F.2d at 697, 705. Indeed, "[t]his court has neither the expertise nor the constitutional authority to make 'policy' as that word is commonly understood. That role is reserved to the Congress and, within the bounds of delegated authority, to the [Board]. But in matters of interpreting the 'law' the final say is constitutionally committed to the judiciary." *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 854-55 (D.C. Cir. 1979) (en banc), *cert. granted*, ____ U.S. ____, 100 S.Ct. 1273 (1980) (citations omitted.)

We conclude that the Board's failure to conduct a hearing was arbitrary, capricious, and unlawful.

II

We thus come to the question of how we should dispose of this matter. ICFA has requested that we enforce the Board's order as though the Supreme Court had never affirmed *Yeshiva*. It is quite obvious that *Yeshiva* is applicable and even the Board no longer seeks enforcement of

its order. ICFA's claim for attorneys' fees was properly rejected by the Board. The continued claim of the College that the principles of *Yeshiva* be applied cannot without any show of reason be described as "frivolous", which is essentially the Board's test in deciding whether or not counsel fees are appropriate. See *Orion Corp.*, 210 N.L.R.B. 633 (1974), *aff'd*, 515 F.2d 81 (7th Cir. 1975).

Neither can we grant the College's request that summary judgment be granted in its favor. Although the College did not move for summary judgment in the proceedings below, the General Counsel of the Board did, and this Court clearly has the power to order the entry of summary judgment to the non-movant given the appropriate circumstances. *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 165 (2d Cir. 1971). This case, however, does not present the appropriate circumstances. As Moore notes in his Treatise, "[c]are should, of course, be taken by the [appellate] court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried." 6 Moore's Federal Practice ¶ 56.12 at 334 (1976). The General Counsel's motion for summary judgment below was predicated, and granted, on the notion that the College had not raised any new issues before the Board that it could not have raised during the representation hearing. The motion was addressed to that procedural issue; it was not concerned with the substantive issue of whether the faculty members at Ithaca College were managers. And all throughout the proceedings below, the Board's actions in refusing to acknowledge the *Yeshiva* decision effectively precluded ICFA from presenting its case on those grounds.

Nor do we grant the Board's request for a remand. Although we are empowered, we are not required to re-

mand. We may adjust our relief to the exigencies of the case in accordance with the equitable principles which govern judicial action. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373-74 (1939); *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir.), petition for rehearing denied, 542 F.2d 707, 709 (1976).

Here ICFA, whose interests are primarily at stake, has sought no remand, recognizes no factual issues, and in its supplemental brief filed after the Supreme Court's affirmance of *Yeshiva* and after oral argument still maintains that "the litigation in *Yeshiva* is of absolutely no import to this case." The Board had the opportunity to address the issue of faculty status and it improperly and arbitrarily refused to resolve that issue. This has exposed the College to needless expense and unwarranted prejudicial publicity. The election was close and hotly contested. The passage of time created by the Board's refusal to address these issues has undoubtedly been accompanied by changes in faculty personnel. All of these equitable factors, as well as the position of ICFA, lead us to conclude that a remand is here not appropriate. See *NLRB v. Producers Cooperative Assoc.*, 457 F.2d 1121 (10th Cir. 1972); *NLRB v. Sidron*, 181 F.2d 671 (5th Cir. 1950).

This determination is of course without prejudice to the right of ICFA, or any other group, to file a representation petition with the Regional Office of the Board seeking to represent whatever employee group it deems appropriate within the Act as interpreted by the Supreme Court in *Yeshiva*.

The College's petition for review is granted and the proceedings are dismissed. ICFA's petition for review and the Board's cross-petition for enforcement are denied.

APPENDIX "B"

FPT

244 NLRB No. 54

D—5452
Ithaca, NY

United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE

and

Case 3—CA—8962

ITHACA COLLEGE FACULTY
ASSOCIATION (I.C.F.A.)

DECISION AND ORDER

Upon a charge filed on February 23, 1979, by Ithaca College Faculty Association (I.C.F.A.), herein called the Association, and duly served on Ithaca College, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint and notice of hearing on March 29, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

The complaint alleges in substance that on January 31, 1979, following a Board election in Case 3—RC—7107,

the Association was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] that, commencing on or about February 12, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so; and that, since on or about February 9, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to supply the Association with certain requested information relevant to and necessary for the Association's performance as the collective-bargaining representative of the unit employees. On April 6, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 17, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 23, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause and, subsequently, the Association filed its brief in support of the General Counsel's motion and a request for extraordinary relief.

---

[1]Official notice is taken of the record in the representation proceeding, Case 3—RC—7107, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F. 2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F. 2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D. C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F. 2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer to the complaint, Respondent admits that it has refused to bargain with the Association since February 16, 1979. However, Respondent contests the representative status of the Association on the grounds that (1) the full-time faculty members of the College are managerial and/or supervisory personnel and not employees within the meaning of Section 2(3) of the Act; (2) the Board's certification of the Association is without effect because the Board erred in adopting the Regional Director's findings and recommendations in the Report on Objections and Challenges dated November 8, 1978; and (3) the Board further erred by rejecting certain exceptions filed by Respondent to the Regional Director's Report on Objections and Challenges. With respect to the allegation that its refusal to supply certain information to the Association constitutes an additional violation of the Act, Respondent contends that the requested information, a list of names of those full-time faculty members being considered for promotion and/or tenure, pertains to a nonmandatory subject or bargaining and that the requested information was available to the Association through other sources. Consequently, Respondent contends that it has no legal obligation to furnish the requested information.

In support of the Motion for Summary Judgment, the General Counsel contends, *inter alia*, that Respondent is attempting to relitigate matters considered and disposed of in the prior representation proceeding. The General Counsel further contends that the requested information is relevant to the Association in discharging its statutory responsibilities as collective-bargaining representative of the unit employees.

Review of the entire record in this proceeding, including that in Case 3—RC—7107, establishes that pursuant to a Decision and Direction of Election, an election was held on March 3, 1978, in which the vote was 70 for Petitioner,[2] 74 for the Association, 98 against the participating labor organizations, and 10 challenged ballots. After an investigation, the Regional Director issued a Report on Challenged Ballots and Objections recommending that the objections be overruled and that five challenges be sustained and five challenges be overruled. On July 26, 1978, the Board issued an order adopting the Regional Director's report and directing the Regional Director to open and count five challenged ballots. The revised tally which issued showed 71 votes for Petitioner, 74 for the Association, and 104 against the participating labor organizations.

Because none of the choices received a majority in the initial election, pursuant to Section 102.70 of the Board's Rules and Regulations, Series 8, as amended, a run-off

[2]The petition was filed on December 8, 1977, by Ithaca College Chapter AAUP.

election was conducted on September 29, 1978.[3] Results of the run-off election showed 116 votes for the Association, 109 against, with 9 challenged ballots. The Employers filed objections and, on November 8, 1978, the Regional Director issued a Report on Objections and Challenges recommending that the Respondent's objections be overruled and that three of the challenges be overruled, leaving an insufficient number of challenges to affect the outcome of the run-off election. On January 31, 1979, the Board issued a Decision and Certification of Representative, adopting the Regional Director's findings and recommendations and certifying the Association. Thereafter, Respondent filed a motion for reconsideration which the Board denied on February 22, 1979.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

[3]Prior to the run-off election, Respondent filed a motion for rehearing, which was denied by the Regional Director on August 25, 1978, and on September 25, 1978, the Board denied Respondent's request for review of the Regional Director's denial of its motion. On or about September 15, 1978, Respondent attempted to withdraw the previously submitted *Excelsior* list on the ground that every individual named on that list was a supervisor and/or managerial employee. During the run-off election Respondent attempted to challenge the status of every voter on the same basis. In support of its motion for rehearing and attempted withdrawal of the *Excelsior* list, the Respondent relied on the Second Circuit Court of Appeals' ruling in *N.L.R.B. v. Yeshiva University*, 582 F. 2d 686 (1978), cert. granted 99 S. Ct. 1212 (1979). With all due respect to the view expressed by the Second Circuit in *Yeshiva, supra*, we shall adhere to our position until the Supreme Court has passed on the matter.

[4]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

With the exception of its defense to the allegation that it has refused to supply the Association with certain requested information, all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.

With respect to the request to supply information, Respondent concedes that the Association has requested a list of all full-time faculty members currently being considered for promotion and/or tenure. As the collective-bargaining representative for employees within the appropriate unit, the Association is entitled to information on the classification and seniority of each unit employee and to information concerning any changes in an employee's status. Consequently, we find that Respondent's affirmative defense to the allegation of refusal to supply information is without merit.

We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[5]

[5]The Association's request for extraordinary remedies is denied since we do not believe that the defenses raised by Respondent in this proceeding are patently frivolous.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT.

I. THE BUSINESS OF RESPONDENT

Respondent is a private, nonprofit institution of higher education, chartered by the State of New York, with its principal campus and headquarters at Ithaca, New York. Respondent derives annual gross revenues in excess of $1 million. In the course and conduct of its annual business operations, Respondent purchases, transfers, and delivers to the Ithaca, New York, campus goods and materials valued in excess of $50,000 which are transported to said campus directly from States of the United States other than the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Ithaca College Faculty Association (I.C.F.A.) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York, location and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act.

2. The certification

On September 29, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 3, designated the Association as their representative for the purpose of collective bargaining with Respondent.

The Association was certified as the collective-bargaining representative of the employees in said unit on January 31, 1979, and the Association continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about January 31, 1979, and at all times thereafter, the Association has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the

above-described unit. Commencing on or about February 16, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Association as the exclusive representative for collective bargaining of all employees in said unit.

On or about February 6, 1979, the Association requested Respondent to furnish it with certain information relevant to and necessary for the Association's performance as the collective-bargaining representative of the unit employees. Since on or about February 9, 1979, and, at all times thereafter to date, Respondent has refused, and continues to refuse, to supply the Association with the requested information.

Accordingly, we find that Respondent has, since February 16, 1979, and at all times thereafter, refused to bargain collectively with the Association as the exclusive representative of the employees in the appropriate unit and, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. We further find that Respondent has, since February 9, 1979, and at all times thereafter, refused to supply the Association with certain requested information necessary for and relevant to the Association's performance as the collective-bargaining representative of the unit employees and, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations de-

scribed in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Association as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement. We shall further order Respondent to supply the Association, upon request, with information necessary for and relevant to the Association's performance of its function as the collective-bargaining representative of the unit employees.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Association as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (5th Cir. 1964), cert. denied 379 U. S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW.

1. Ithaca College is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Ithaca College Faculty Association (I.C.F.A.) is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time faculty members employed by Ithaca College at its Ithaca, New York, location and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 31, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 16, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and by refusing, on or about February 9, 1979, to supply the Association with certain requested information necessary for and relevant to the Association's performance as the collective-bargaining representative of the unit employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusals to bargain, and supply information, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices with the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ithaca College, Ithaca, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Ithaca College Faculty Association (I.C.F.A.) as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York, location and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act.

(b) Refusing to provide the Association, upon request, information relevant to and necessary for its performance as the collective-bargaining representative of the unit employers *[sic]*.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement and provide the Association, upon request, a list of all full-time faculty members being considered for promotion and/or tenure and all other information relevant to and necessary for the Association's performance as the collective-bargaining representative of the unit employers *[sic]*.

(b) Post at its Ithaca, New York, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. August 22, 1979

JOHN H. FANNING, Chairman

JOHN A. PENELLO, Member

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX "C"

ITHACA COLLEGE

Employer

and Case No. 3—RC—7107

AAUP CHAPTER, ITHACA COLLEGE

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:[1]

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1]The Petitioner attached to its brief several appendices and included in its brief matters not introduced at, and evidence which was not offered at the hearing nor made a part of the record herein. Only those matters introduced at the hearing and made a part of the record can be considered in the determination made herein. Accordingly, only the evidence and exhibits made part of the record were considered in the determinations made herein. In view of the unit finding herein based on established Board precedent, the post-hearing material submitted by the Petitioner would not, in any event, alter the conclusions hereinafter set forth.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

3. The labor organization(s) involved claim to represent certain employees of the Employer.[3]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

---

[2]Ithaca College is a private non-profit institution of higher education, chartered in the State of New York with its principal campus and headquarters at Ithaca, New York.

Annually, Ithaca College derives gross revenues in excess of one million dollars exclusive of any contributions which, because of limitations by the grantor, are not available for operating expenses. Annually, Ithaca College purchases and receives goods and materials valued in excess of $5,000 at its New York location directly from points located outside the State of New York. The parties stipulated, and I find, that Ithaca College is engaged in commerce within the meaning of the Act.

[3]New York State United Teachers of Ithaca College Faculty Association was permitted to intervene at the hearing based upon an adequate showing of interest.

[4]Both Petitioner and Intervenor seek a unit consisting of all full time and all part-time faculty members employed by the Employer at its College in Ithaca, New York. The Employer contends that part-time faculty members should be excluded and that the only appropriate unit would consist of all full time faculty members.

The *Employer operates a* College located in Ithaca, New York, where it enrolled a total of 4,720 students as of the Fall semester, 1977. This total consists of 4,421 full time undergraduate students, 74 part-time undergraduate students, and 225 graduate and non-degree students.

The chief academic units of the College consist of the School of Humanities and Sciences, School of Music, School of Allied Health,

(Continued on following page)

(Footnote continued)

School of Health, Physical Education-Recreation, School of Business Administration, School of Communications, and the Center for Individual and Interdisciplinary Studies.

The Employer employs a total of 943 employees of which 279 are full time faculty and 107 are part-time faculty.

The governing authority of the Employer is vested in its Board of Trustees which consists of 25 members. The President of the College holds the Employer's chief executive position and reports directly to the Board of Trustees. The provost is the Chief Academic Officer of the College and reports directly to the President.

Dr. Frank Falcone, provost of Ithaca College, testified at the hearing, and explained, in detail, the existing differences in terms and conditions of employment between full time and part-time faculty at Ithaca College. Of the 279 full time faculty at the College 57 are professors, 100 are associate professors, 93 are assistant professors, 22 are instructors, and 1 is a lecturer. Of the 107 part-time faculty employed at Ithaca College, 1 is a professor, 2 are associate professors, 37 are assistant professors, 44 are instructors, and 23 are lecturers. As can be seen from the titular breakdown above, and as testified to by Dr. Falcone, the titles professor and associate professor are not ordinarily associated with part-time faculty, and, in a like manner, the title lecturer is not ordinarily associated with full time faculty. Likewise, full time faculty are ordinarily originally hired in the position of assistant professor after a national search in which an entire department of the College will be involved, while part-time faculty are ordinarily hired in the position of instructor or lecturer after a local or regional search conducted solely by a department chairman. In this regard, a terminal degree in the discipline to be taught is required of full time faculty members and is not a requirement for part-time faculty status.

Dr. Falcone also testified that full time faculty are required to engage in teaching, research, advising students, and service on College committees, while part-time faculty are only required to teach. With respect to teaching the record reveals that full time faculty carry an average annual teaching load of 24.4 credits and part-time faculty carry an average annual teaching load of 9.2 credits.

Dr. Falcone also testified to the following differences between full time faculty and part-time faculty:

1. *Tenure*—Ithaca College defines tenure as an offer of continuous employment for purposes of guaranteeing academic freedom. Tenure is granted by the Board of Trustees, normally after five or six years employment and is available only to full time faculty.

(Continued on following page)

(Footnote continued)

2. *Promotional Sequence*—Full time faculty are promoted from Instructor to Assistant Professor to Associate Professor to Professor. The Employer has no promotional sequence for part-time faculty.

3. *Notification of Termination of Faculty*—After the first year of employment, full time faculty must be given a full year notice if their contract will not be renewed. There is no such requirement for part-time faculty.

4. *Method of Compensation*—Full time faculty members are compensated on an annual salary basis regardless of the number of students taught or the number of courses carried. Part-time faculty are compensated either by an amount per course taught, an amount per student taught, a contract fee, or a fixed amount either annually or by the semester.

5. *Sabbatical Leave*—Full time faculty may take a fully paid sabbatical leave for the period of one semester or may take a full leave year at half pay. Part-time faculty are not entitled to sabbatical leave.

6. *Faculty Council*—The College maintains a faculty council which is a representative body serving in an advisory capacity to the College. Part-time faculty do not participate in this council.

7. *College-wide Standing Committee*—The College maintains a number of College-wide standing committees such as the tenure and promotion committee. Part-time faculty ordinarily do not serve on the committees.

In *New York University*, 205 NLRB 4, the Board, in reversing prior decisions, on the issue of inclusion of part-time faculty with full time faculty in collective bargaining units states: "We are now convinced that the differences between the full-time and part-time faculty are so substantial in most colleges and universities. . . we shall *exclude* all adjunct professors and part-time faculty members who are not employed in 'tenure track' positions."

Although the record contains the testimony of one witness that tends to establish some similarities in terms and conditions of employment between full time and part-time faculty, the entire record clearly reveals that whatever similarities there may be are heavily outweighed by the above-enumerated dissimilarities.

Accordingly, based on the foregoing, the record as a whole, and especially upon the fact that part-time faculty at Ithaca College are not in "tenure track" position, I shall exlude part-time faculty members.

All full time faculty members employed by Ithaca College at its Ithaca, New York location[5] but excluding all guards, confidential employees, part-time faculty, and supervisors[6] as defined in the Act.

DIRECTION OF ELECTION[7]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility

[5]The record reveals that the Employer maintains facilities in London, England, an affiliation with Broome County Community College, and an affiliation with Albert Einstein Hospital in New York City. Although it appears that the Employer employs employees including faculty at these locations, no party at the hearing raised a multi-location bargaining unit issue, but rather, they appear to agree that the appropriate unit should be limited to the Employer's Ithaca, New York location.

[6]The record reveals that the parties stipulated that Department Chairmen should be excluded from the unit if they are supervisors within the meaning of the Act. Inasmuch as the record does not reveal sufficient information upon which to base a conclusion on this issue, I shall permit Department Chairmen to vote subject to challenge by any party.

[7]In a post-hearing request, the Employer raised the issue of whether the Petitioner and Intervenor had a sufficient showing of interest to participate in the election in the event the part time employees are excluded from the unit. I am administratively satisfied that the Petitioner and Intervenor have a sufficient showing of interest in the unit found appropriate herein to participate in the election in the unit found appropriate herein.

period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by AAUP CHAPTER, ITHACA COLLEGE: or by NEW YORK STATE UNITED TEACHERS OF ITHACA COLLEGE FACULTY ASSOCIATION.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the National Labor Relations Board, Region Three, Federal Building, Room 901, 111 West Huron Street, Buffalo, New York 14202 on or before February 10, 1978. No extension of time to file this list may be granted, nor shall the filing of a request for review operate

to stay the filing of such list except in extraordinary circumstances, failure to comply with this requirement shall be grounds for setting aside the proper election whenever objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D. C. 20570. This request must be received by the Board in Washington by February 16, 1978.

Dated: February 3, 1978 at Buffalo, New York.

(Illegible)
Regional Director, Region Three

(Seal)

APPENDIX "D."

STIPULATION.

We the undersigned parties to the captioned case, hereby agree and stipulate that the Regional Director may amend the unit description set forth in his Decision and Direction of Election in the captioned case by also including in the bargaining unit employees of Ithaca College who are employed on a full time basis at Albert Einstein Medical Center in New York City.

Accordingly, it is agreed and stipulated by the parties hereto that the said unit description may be amended to read as follows:

> All full time faculty members employed by Ithaca College at its Ithaca, New York location and at the Albert Einstein Medical Center in New York City, but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act.

The undersigned parties do hereby also agree and stipulate that the inclusion in the unit of the said employees at Ithaca College who are employed at the Albert Einstein Medical Center shall not, in part or in whole, be grounds for objections to conduct affecting the results of the election, and we hereby agree and stipulate

that the eligibility issues resolved herein are final and binding upon the parties.

ITHACA COLLEGE
(Employer)
Bond, Schoeneck & King
By William L. Bergan Date 2/13/78

AAUP CHAPTER, ITHACA COLLEGE
(Name of Organization)
By /s/ Charles J. Schneider Date 2/14/78

NEW YORK STATE UNITED TEACHERS OF ITHACA COLLEGE FACULTY ASSOCIATION
(Name of other Organization)
By /s/ Paul S. Mayo Date 2/14/78

Reommended:
(Illegible) Date 2/23/78
Date approved 2-23-78
(Illegible)
Regional Director
National Labor Relations Board
Case No. 3-RC-7107

APPENDIX "E."

ORDER DIRECTING REGIONAL DIRECTOR TO OPEN AND COUNT CHALLENGED BALLOTS

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE,

Employer,

and

AAUP CHAPTER, ITHACA COLLEGE,

Petitioner.

Case 3-RC-7107

Pursuant to a Decision and Director of Election issued by the Regional Director for Region 3 of the National Labor Relations Board on February 3, 1978, an election by secret ballot was conducted in the above-entitled proceeding on March 3, 1978, under the direction and supervision of said Regional Director. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations.

The tally of ballots shows that there were approximately 283 elegible voters and that 256 ballots were cast, of which

70 were for the Petitioner, 74 were for the Intervenor,[1] 98 were against the participating labor organizations, 10 were challenged, and 4 were void.

The challenged ballots are sufficient in number to affect the results of the election and, on March 9, 1978, the Petitioner filed timely objections to the conduct of the election. The Regional Director caused a full and complete investigation of the challenged ballots and objections to be made and, thereafter, on April 27, 1978, issued and served on the parties his Report on Challenged Ballots and Objections. In his report, the Regional Director recommended to the Board that the Petitioner's objections be overruled in their entirety, that the challenges to 5 ballots be sustained, that the challenges to 5 ballots be overruled, that said ballots be opened and counted at a time and place subsequently to be determined, and that a revised tally of ballots be issued.

No exceptions to the Regional Director's report having been filed by any of the parties, the Board adopts the Regional Director's recommendations as contained in his report. Accordingly, the Petitioner's objections are hereby overruled in their entirety, the challenges to the ballots of Jeffry D. Bishop, Gordon E. Coggshall, Dr. David Hammond, Catherine Penner and E. William Terwilliger are hereby sustained, and the challenges to the ballots of Constantine Periales, Charles A. Kerr, William H. Ware, Carl Wickstrom and Fahri Unsel are hereby overruled.

IT IS HEREBY DIRECTED that, as part of the investigation to ascertain a representative for the purposes of collective bargaining among certain employees of Ithaca College, in the unit heretofore found appropriate, the Regional Director for Region 3 shall, pursuant to the Board's Rules and Regulations, at a time and place subsequently to be determined, open and count those ballots to

[1] Ithaca College Faculty Association, NYSUT-AFT.

which the challenges have been overruled and, thereafter, prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots, upon the basis of which he shall take such further action as he deems appropriate.

Dated, Washington, D.C., July 26, 1978.

By direction of the Board:

ROBERT VOLGER
Deputy Executive Secretary

APPENDIX "F."

DECISION AND CERTIFICATION OF REPRESENTATIVE.

Not Included in Bound Volumes

FPT Ithaca, N. Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE,

Employer,

and

ITHACA COLLEGE AAUP CHAPTER,

Petitioner.

Case 3-RC-7107

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to a runoff elec-

tion held September 29, 1978,[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the Regional Director's findings[2] and recommendations.

[1]The original election was conducted pursuant to a Decision and Direction of Election on March 3, 1978. Inasmuch as none of the choices received a majority of the valid votes cast in that election, a runoff election between the Intervenor, Ithaca College Faculty Association, NYSUT-AFT, and the choice of no representative was conducted on September 29. The tally of ballots showed that of approximately 252 eligible voters, 116 ballots were for the Petitioner, 109 ballots were cast against the participating labor organization, and there were 9 challenged ballots. The Regional Director recommended that the challenges to the ballots of Patricia Woodworth, Eric Robinson, George Valesente and Steve Ryan be sustained on the grounds that they were not employed in the appropriate unit as of the eligibility date, and further recommended that the ballots of Robert Button and Arthur Harry McCue be sustained on the grounds that they were emplyed part-time at the time of the eligibility date. With the exception of his recommendation on McCue, we hereby adopt the Regional Director's recommendations. Although evidence submitted by the Employer appears to establish that McCue, as Chairman of the Art Department, was a full-time faculty member at the time of the eligibility date, McCue's possible supervisory status precludes us from finding him eligible. In any event, since the number of remaining challenges, including McCue's, is insufficient in number to influence the results of the election, we find it unnecessary to determine McCue's elgibility.

[2]Although the Regional Director's Report indicates that the Board has considered and rejected the Employer's contention that its faculty members are supervisors or managerial employees, the Employer's request for review of the Regional Director's denial of its Motion for Rehearing was denied by the Board, by telegraphic order on September 26, 1978, only on the usual grounds that the motion raised no substantial issues warranting review.

Assuming *arguendo* that Chester Galaska was an agent of the Intervenor, we find that his alleged misrepresentation does not warrant setting aside the election. *General Knit of California, Inc.*, 239 NLRB No. 101 (1978); and *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962). Member Penello agrees that Galaska's alleged misrepresentation could not warrant setting aside the election for the reasons stated in *Shopping Kart Food Market*, 228 NLRB 1311 (1977), and his dissenting opinion in *General Knit, supra.*

CERTIFICATION OF REPRESENTATIVE.

It is hereby certified that a majority of the valid ballots have been cast for Ithaca College Faculty Association, NYSUT-AFT, and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time faculty members employed by Ithaca College at its Ithaca, New York locations and at the Albert Einstein Medical Center in New York City, but excluding all guards, part-time faculty, and supervisors as defined in the Act.

Dated, Washington, D.C.
January 31, 1979

JOHN H. FANNING, Chairman

JOHN A. PENELLO, Member

JOHN C. TRUESDALE, Member

(Seal) NATIONAL LABOR RELATIONS BOARD